Setiausaha Kerajaan Negeri Sembilan Darul Khusus & Anor v NS Water Konsortium Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-01-02(W)-305–08 OF 2017
HARMINDAR SINGH, SURAYA OTHMAN AND AZIZAH NAWAWI JJCA
7 JANUARY 2021

Contract — Formation — Whether parties had a concluded contract — Whether evidence showed parties intended signing of a formal contract to take place before they were bound by their respective obligations — Whether evidence showed parties were awaiting approval from relevant authorities to privatisation of State's water supply and services before executing formal contract — Whether there was no concluded contract on which plaintiff could sue — Whether even if letter of intent and conditional letter of award issued by State Government could be regarded as a concluded contract the same was frustrated by unforeseeable events beyond State Government's control — Contracts Act 1950, s 57 — Whether in such event the consequential remedies were only those provided under s 15 of the Civil Law Act 1956

In 1996, the second appellant ('the State Government') invited tenders from private parties interested in taking over the supply and management of treated water in Negeri Sembilan. The State Government subsequently issued a letter of intent ('LOI') to the first respondent ('NSWK') stating that it had been chosen as the successful party in the tender exercise and that further discussions would be held to agree on the terms and conditions to be included in a concession agreement ('CA') between the parties. In 1998, the State Government issued to NSWK a conditional letter of award ('LOA') which, inter alia, required NSWK to set up a concession company tasked with the sole purpose of implementing the privatisation scheme and with whom the State Government would sign the CA once all the terms and conditions were finalised. The CA was to be concluded and signed within the six-month validity period of the LOA but, as events turned out, the LOA was extended several times pending approval from the Federal Government/the Economic Planning Unit ('EPU') of the Prime Minister's Department to the privatisation scheme. In the meanwhile, the second and third respondents, who were directors in NSWK and in the fourth and fifth respondents, caused the latter two respondent companies to construct a hotel and two official houses for the State Government purportedly as part of the privatisation scheme. The terms and conditions of the proposed CA were never finalised, the agreement was never signed and the implementation of the privatisation scheme remained in

A abeyance until seven years after the issuance of the LOA when the EPU (and subsequently the State Government) notified NSWK that the privatisation scheme had been cancelled because of a change in Federal Government policy which took away matters concerning water supply and services from the jurisdiction of State Governments and placed them in the hands of a National B Water Services Commission which had power to supervise and regulate water supply and sewerage services and matters related thereto throughout Peninsular Malaysia and the Federal Territories of Putrajaya and Labuan. This was facilitated by an amendment to the Ninth Schedule of the Federal Constitution in March 2005 and the passing of the National Water Services C Commission Act 2006 and the Water Services Industry Act 2006. The respondents nevertheless maintained that based on the terms of reference of the privatisation scheme and the LOI and LOA, NSWK had an enforceable contract with the State Government which the latter had breached thereby causing loss to the respondents. The respondents sued the appellants for breach D of contract claiming that the signing of the proposed CA, which did not take place, was a mere formality to an already concluded contract. The appellants denied the respondents' claims, asserting that there was no concluded contract or any nexus between the water services privatisation scheme and the E construction of the hotel and two official houses. The appellants further said that the State Government's privatisation scheme was rendered impossible of performance by the Federal Government's policy change with respect to matters concerning water supply services. The High Court held that there was a concluded CA and that the State Government's failure to sign the same was F wrongful and breached the terms of the LOA. The court awarded NSWK general damages, loss of value of the concession and loss of profits (to be assessed). It also ordered that the second, fourth and fifth respondents (the third respondent had withdrawn his claim) be indemnified for the losses they had suffered in connection with the construction of the hotel and two official G houses. The instant appeal was against the High Court's decision.

Held, unanimously allowing the appeal and setting aside the High Court's decision:

H (1) Clause 2 of the conditional LOA clearly stipulated that the concession offer was only valid for six months and would lapse automatically if the CA between the State Government and the concession company was not finalised. A plain and natural reading of cl 2 showed that the parties had intended the execution of a separate written CA as a prerequisite to the conclusion of a binding contract. The LOA contained certain conditions I precedent that had to be fulfilled and was subject to the parties entering into a future formal contract, namely the CA, and unless and until the CA had materialised, the LOA was not enforceable whether on its own or read with the terms of reference and the LOI. The documentary evidence showed that the State Government was awaiting approval of the

privatisation plan from the EPU of the Prime Minister's Department. A letter from NSWK also conceded that the privatisation had not commenced following the issuance of the LOA. The evidence showed that the parties were negotiating and did not intend to be bound by a contract for the privatisation of the water services until the CA was signed by all parties concerned. On the evidence there was therefore no enforceable contract for NSWK to sue the State Government for damages because the condition of the parties executing a CA was not fulfilled and the law did not recognise a contract to enter into a contract (see paras 34–38, 49 & 54–55).

(2) The conduct of the parties in continually extending cl 2 of the LOA clearly indicated that they had accepted the requirement to sign a formal CA. If a CA was already concluded from the LOI and the LOA, there was no need for the parties to extend the validity period of the LOA from 1998 to 2005. It was very clear that the purpose of the several extensions was to avoid the LOA from being automatically cancelled and to enable the parties to sign the CA. It was irrational to think that an agreement of such magnitude as the proposed CA involving public interest, public policy and public funds running into hundreds of millions of ringgit would be based merely on a few pieces of paper in the form of the LOI and the LOA (see paras 40, 47 & 52).

(3) Even if it was assumed that there was a concluded contract as alleged by the respondents, its performance was frustrated by the 21 March 2005 amendment to the Ninth Schedule of the Federal Constitution which removed 'water supply and services' from the jurisdiction of the State Government and put them under the exclusive jurisdiction of the National Water Services Commission. Pursuant to s 57 of the Contracts Act 1950, such frustration brought the contract to an end and pursuant to s 15 of the Civil Law Act 1956 the respondents could only claim a reasonable amount for expenses incurred and for the benefit of work done. The trial judge erred not only in failing to consider the issue of frustration but also in awarding the respondents the value of the concession and future profits for the entire concession period of 30 years (see paras 59, 62 & 65–69).

(4) There was no nexus between the proposed CA and the construction of the hotel and the two official houses; hence the claims for indemnity by the second, fourth and fifth respondents were not sustainable. Nothing in the terms of reference, LOI or the LOA made reference to the hotel and the two official houses and neither were the second to fifth respondents privy to the LOI or the LOA for them to make a claim for indemnity based on the alleged breach and/or frustration of the proposed CA (see paras 71–75).

[Bahasa Malaysia summary

Pada tahun 1996, perayu kedua ('Kerajaan Negeri') menjemput tender dari pihak swasta yang berminat mengambil alih bekalan dan pengurusan air terawat di Negeri Sembilan. Kerajaan Negeri kemudiannya mengeluarkan surat niat ('LOI') kepada responden pertama ('NSWK') yang menyatakan bahawa ia telah dipilih sebagai pihak yang berjaya dalam proses tender tersebut dan bahawa perbincangan selanjutnya akan diadakan untuk persetujuan terma dan syarat untuk dimasukkan dalam Perjanjian Konsesi ('PK') antara pihak-pihak. Pada tahun 1998, Kerajaan Negeri mengeluarkan kepada NSWK surat penganugerahan kerja bersyarat ('LOA') yang, antara lain, mewajibkan NSWK untuk menubuhkan syarikat konsesi yang ditugaskan dengan tujuan utama bagi melaksanakan skim penswastaan dan dengan pihak mana Kerajaan Negeri akan menandatangani PK setelah kesemua terma dan syarat dimuktamadkan. PK akan disempurnakan dan ditandatangani dalam tempoh sah enam bulan LOA tetapi, sepertimana yang berlaku, LOA telah dilanjutkan beberapa kali sementara menunggu persetujuan dari Kerajaan Persekutuan/Unit Perancang Ekonomi ('UPE') Jabatan Perdana Menteri bagi skim penswastaan. Sementara itu, responden kedua dan ketiga, yang merupakan pengarah dalam NSWK dan responden keempat dan kelima, menyebabkan kedua syarikat responden tersebut membina sebuah hotel dan dua rumah rasmi untuk Kerajaan Negeri yang dikatakan sebagai sebahagian daripada skim penswastaan. Terma dan syarat PK yang dicadangkan tidak pernah dimuktamadkan, perjanjian tersebut tidak pernah ditandatangani dan pelaksanaan skim penswastaan dalam keadaan tergantung sehingga tujuh tahun selepas pengeluaran LOA ketika UPE (dan kemudiannya Kerajaan Negeri) memaklumkan NSWK bahawa skim penswastaan telah dibatalkan kerana terdapat perubahan dalam dasar Kerajaan Persekutuan yang mengambil alih hal-hal mengenai bekalan dan perkhidmatan air dari bidang kuasa Kerajaan Negeri dan meletakkannya di tangan Suruhanjaya Perkhidmatan Air Negara yang memiliki kuasa untuk menyelia dan mengawal bekalan air dan perkhidmatan pembetungan dan perkara-perkara yang berkaitan dengannya di seluruh Semenanjung Malaysia dan Wilayah Persekutuan Putrajaya dan Labuan. Ianya dilaksanakan oleh pindaan di Jadual Kesembilan Perlembagaan Persekutuan pada bulan Mac 2005 dan kelulusan Akta Suruhanjaya Perkhidmatan Air Negara 2006 dan Akta Industri Perkhidmatan Air 2006. Responden walau bagaimanapun, berpendapat bahawa berdasarkan Terma Rujukan bagi skim penswastaan dan LOI dan LOA, NSWK mempunyai kontrak yang dapat dikuatkuasakan dengan Kerajaan Negeri yang mana telah dilanggar olehnya sehingga menyebabkan kerugian kepada responden. Responden menyaman perayu kerana melanggar kontrak dengan mendakwa bahawa penandatanganan PK yang dicadangkan tersebit, yang mana tidak pernah berlaku, hanyalah sekadar formaliti kepada kontrak yang sudah dimuktamadkan. Perayu membantah tuntutan responden, dengan menyatakan bahawa tidak ada kontrak yang dimuktamadkan atau ada

hubungan antara skim penswastaan perkhidmatan air dengan pembinaan hotel dan dua rumah rasmi. Perayu selanjutnya mengatakan bahawa skim penswastaan Kerajaan Negeri mustahil untuk dilaksanakan oleh perubahan dasar Kerajaan Persekutuan berhubung dengan hal-hal mengenai perkhidmatan bekalan air. Mahkamah Tinggi memutuskan bahawa terdapat pk yang dimuktamadkan dan kegagalan Kerajaan Negeri untuk menandatanganinya adalah salah dan melanggar terma-terma LOA. Mahkamah memberikan ganti rugi am kepada NSWK, kehilangan nilai konsesi dan kehilangan keuntungan (akan ditaksirkan). Ia juga memerintahkan agar responden kedua, keempat dan kelima (responden ketiga telah menarik balik tuntutannya) akan diganti rugi atas kerugian yang mereka alami berhubung dengan pembinaan hotel dan dua rumah rasmi. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Klausa 2 LOA bersyarat dengan jelas memperuntukkan bahawa tawaran konsesi hanya sah untuk tempoh enam bulan dan akan tamat secara automatik sekiranya PK antara Kerajaan Negeri dan syarikat konsesi tidak dimuktamadkan. Pembacaan klausa 2 secara jelas dan lazim menunjukkan bahawa pihak-pihak telah berniat untuk pelaksanaan PK bertulis secara berasingan sebagai prasyarat bagi memuktamadkan kontrak yang mengikat. LOA mengandungi syarat-syarat tertentu yang harus dipenuhi dan tertakluk kepada pihak-pihak yang menandatangani kontrak formal akan datang, aitu PK, dan kecuali dan sehingga PK wujud, LOA tidak dapat dikuatkuasakan sama ada secara sendiri atau dibaca dengan Terma Rujukan dan LOI. Keterangan dokumentari menunjukkan bahawa Kerajaan Negeri sedang menunggu persetujuan rancangan penswastaan dari UPE Jabatan Perdana Menteri. Surat dari NSWK juga mengakui bahawa penswastaan tersebut belum dimulakan setelah pengeluaran LOA. Keterangan menunjukkan bahawa kedua-dua pihak sedang berunding dan tidak berniat untuk terikat dengan kontrak bagi penswastaan perkhidmatan air sehingga SK ditandatangani oleh kesemua pihak yang berkenaan. Oleh itu, pada keterangan tidak ada kontrak yang dapat dikuatkuasakan untuk NSWK menyaman Kerajaan Negeri atas ganti rugi kerana syarat pihak yang melaksanakan SK tidak dipenuhi dan undang-undang tidak mengakui kontrak untuk memasuki kontrak (lihat perenggan 34–38, 49 & 54–55).

(2) Tingkah laku pihak-pihak secara berterusan dalam melanjutkan klausa 2 LOA secara jelas menunjukkan bahawa mereka telah menerima syarat untuk menandatangani SK formal. Sekiranya SK telah dimuktamadkan dari LOI dan LOA, tidak ada keperluan bagi pihak-pihak untuk melanjutkan tempoh sah LOA dari tahun 1998 hingga 2005. Ianya sangat jelas bahawa tujuan dari beberapa lanjutan tersebut adalah untuk

mengelakkan LOA dari dibatalkan secara automatik dan untuk membolehkan pihak menandatangani SK. Ianya adalah tidak wajar untuk berpendapat bahawa perjanjian sebesar SK yang dicadangkan yang melibatkan kepentingan awam, dasar awam dan dana awam yang mencecah ratusan juta ringgit hanyalah berdasarkan kepada beberapa helaian kertas dalam bentuk LOI dan LOA (lihat perenggan 40, 47 & 52).

(3) Sekiranya terdapat andaian bahawa wujudnya kontrak yang telah dimuktamadkan seperti yang didakwa oleh responden, kekecewaan perlaksanaannya terhadap pindaan 21 Mac 2005 pada Jadual Kesembilan Perlembagaan Persekutuan yang membuang 'bekalan air dan perkhidmatan' dari bidang kuasa Kerajaan Negeri dan meletakkannya di bawah bidang kuasa eksklusif Suruhanjaya Perkhidmatan Air Negara. Berdasarkan s 57 Akta Kontrak 1950, kekecewaan tersebut menyebabkan kontrak ditamatkan dan menurut s 15 Akta Undang-Undang Sivil 1956, responden hanya dapat menuntut sejumlah wang yang munasabah bagi perbelanjaan yang ditanggung dan kerja siap. Hakim perbicaraan telah terkhilaf bukan sahaja kerana gagal mempertimbangkan isu kekecewaan tetapi juga memberi kepada responden nilai konsesi dan keuntungan masa depan untuk keseluruhan tempoh konsesi selama 30 tahun (lihat perenggan 59, 62 & 65–69).

(4) Tidak sebarang kaitan antara SK yang dicadangkan dan pembinaan hotel dan dua rumah rasmi; oleh itu tuntutan ganti rugi oleh responden kedua, keempat dan kelima tidak dapat dipertahankan. Tidak ada dalam Terma Rujukan, LOI atau LOA yang merujuk kepada hotel dan dua rumah rasmi dan kedua-dua responden kedua hingga kelima bukanlah pihak kepada LOI atau LOA bagi mereka untuk membuat tuntutan ganti rugi berdasarkan dakwaan pelanggaran dan/atau kekecewaan SK yang dicadangkan (lihat perenggan 71–75).]

Cases referred to

Ayer Hitam Tin Dredging Malaysia Berhad v YC Chin Enterprises [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (refd)

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327; [1997] 1 CLJ 625, FC (refd)

Gan Yook Chin & Anor v Lee Ing Chin & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 201; [2007] 3 CLJ 695, CA (refd)

Kam Mah Theatre Sdn Bhd v Tan Lay Soon [1994] 1 MLJ 108; [1994] 1 CLJ 1, SC (refd)

Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang [2006] 4 MLJ 656; [2006] 2 CLJ 1040, CA (refd)

Lee Ing Chin v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)
Low Kar Yit & Ors v Mohamed Isa & Anor [1963] MLJ 165; [1963] 1 LNS 77 (refd)
Pacific Forest Industries Sdn Bhd & Anor v Lin Wen Chih & Anor [2009] 6 MLJ 293, FC (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (refd)
Von Hatzfeldt-Wildenburg v Alexander [1912] 1 Ch 284, ChD (refd)

Legislation referred to

Civil Law Act 1956 s 15
Contracts Act 1950 s 57
Federal Constitution Ninth Schedule, Lists I, II
Government Contracts Act 1949 ss 3, 9
Water Services Industry Act 2006 s 3

Appeal from: Civil Suit No 22–81 of 2007 (High Court, Seremban)

GK Ganesan (Marsilawati Mohamad Shah, Muhammad Fairuz Iskandar bin Zainal Abidin, Karthigesan Shanmugam and KN Geetha with him) (Negeri Sembilan State Legal Advisor) for the appellant.
Cyrus Das (Krishna Dallumah, K Terrance and YH Yong with him) (Kassim Tadin Wai & Co) for the respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court dated 21 July 2017, which had allowed the respondents' claim for damages premised on a breach of contract.

[2] Having considered the appeal records and the submissions of the parties, this court had allowed the appeal with costs. Our decision was unanimous and these are our grounds for allowing the appeal. For ease of reference, parties will be referred to as they were in the High Court.

THE SALIENT FACTS

[3] The first plaintiff, NS Water Konsortium ('NSWK') is a company registered in Malaysia with its registered address at Wisma Goshen, Petaling Jaya, Selangor Darul Ehsan.

[4] The second plaintiff is a Malaysian citizen of full age and residing in

Taman Bukit Tembok, Seremban, Negeri Sembilan Darul Khusus. The second plaintiff was a director of the first, fourth and fifth plaintiff companies. The second plaintiff is an undischarged bankrupt.

[5] The third plaintiff is a Malaysian citizen of full age and residing in Petaling Jaya, Selangor Darul Ehsan and had since passed away.

The third plaintiff was a director of the first, fourth and fifth plaintiff companies. The third plaintiff's claim against the defendants had been withdrawn and struck out in the High Court.

[6] The fourth plaintiff is a company registered in Malaysia with its registered address at Suite No 9, Royal Adelphi Hotel (as it then was), Seremban, Negeri Sembilan Darul Khusus.

[7] The fifth plaintiff is a company registered in Malaysia with its registered address at Wisma Goshen, Petaling Jaya, Selangor Darul Ehsan.

[8] Both the fourth and the fifth plaintiffs have been wound up but the requisite sanctions had been granted by the winding up court.

[9] The first defendant is the Secretary of State of the second defendant, the State Government of Negeri Sembilan Darul Khusus ('state government')

[10] In 1996, the state government had issued a tender for the privatisation of the state water department, Jabatan Bekalan Air Negeri Sembilan ('JBANS').

[11] Several companies had shown their interest in the said privatisation of JBANS, including NSWK.

[12] The terms of reference for the proposal on the privatisation of JBANS was circulated on 6 August 1996.

[13] On 16 April 1997, the state government had issued a letter of intent ('LOI') to NSWK. The LOI (exh P1), inter alia, reads:

> Cadangan Penswastaan Jabatan Bekalan Air Negeri Sembilan.
>
> 1 ...
>
> 2 Sukacita dimaklumkan Majlis Mesyuarat Kerajaan yang bersidang pada 9 April 1997 telah membincangkan cadangan tersebut dan mengambil keputusan seperti berikut:-

i. Bersetuju memilih Syarikat N.S Water Konsortium sebagai yang sesuai dan boleh diberikan konsesi Penswastaan Bekalan Air Negeri Sembilan.

ii. Bersetuju supaya Kerajaan Negeri diberikan syer sebanyak 20% daripada projek penswastaan ini dan sebarang pindaan kepada struktur ekuiti saham hanya boleh dibuat dengan persetujuan Kerajaan Negeri terlebih dahulu. Di samping itu semua hutang Kerajaan Negeri kepada Kerajaan Persekutuan seperti yang dipersetujui hendaklah dibayar oleh syarikat yang dipilih iaitu N.S Water Konsortium.

iii. Bersetuju syarikat yang diberikan konsesi ini iaitu N.S Water Konsortium mempastikan sebarang perubahan dari segi dasarnya hendaklah mendapat persetujuan daripada Kerajaan Negeri terlebih dahulu.

iv. Bersetuju supaya pihak Kerajaan Negeri mengadakan rundingan dengan syarikat N.S Water Konsortium berhubung dengan syarat-syarat tambahan yang mesti dimasukkan dalam perjanjian penswastaan Jabatan Bekalan Air Negeri Sembilan ini. Perjanjian ini hendaklah ditandatangani dalam bulan April 1997.

[14] About a year later, a conditional letter of award (exh P2) was issued to NSWK on 25 March 1998 ('LOA'), and it reads, inter alia, as follows:

KONSESI BEKALAN AIR NEGERI SEMBILAN.

Adalah saya dengan sukacitanya memaklumkan bahawa Kerajaan Negeri melalui Majlis Mesyuarat Kerajaan bertarikh 9.4.1997 bersetuju secara prinsip memberi kepada N.S. Water Sdn Bhd, Arab Malaysian Development Sdn Bhd dan Eastern Utilities Sdn Bhd, yang dikenali sebagai N.S. Water Konsortium, hak dan tanggungjawab bekalan air di Negeri Sembilan secara penswastaan tertakluk kepada syarat-syarat dan terma-terma seperti berikut:

(a) N.S. Water Konsortium hendaklah menubuhkan sebuah syarikat baru yang berbentuk 'Single Purpose Company' (dirujuk sebagai Syarikat Konsesi);

(b) Syarikat konsesi ini hendaklah ditubuhkan sebelum perjanjian konsesi antara Kerajaan Negeri Sembilan dengan Syarikat Konsesi ini ditandatangani;

(c) *Perjanjian Konsesi tersebut hendaklah mengandungi*, antara lain, perkara-perkara berikut:
... (i)–(vi)

(d) *Perjanjian Konsesi ini adalah tertakluk kepada beberapa syarat pendahuluan (conditions precedent) yang antaranya ialah —*

(i) Undang-undang baru diluluskan oleh Dewan Undangan Negeri dan dikuatkuasakan;

(ii) Syarikat Konsesi diberi hak dan tanggungjawab bekalan air di Negeri Sembilan; dan

(iii) Syarikat Konsesi memperolehi sumber kewangan yang cukup dan kukuh.

2. *Surat tawaran konsesi ini adalah berkuatkuasa selama enam bulan daripada tarikh ianya dikeluarkan. Sekiranya perjanjian konsesi gagal dimuktamadkan antara Kerajaan Negeri dengan Syarikat Konsesi, maka surat tawaran konsesi ini akan terbatal dengan sendirinya. Dengan pembatalan surat tawaran ini, Syarikat Konsesi atau mana-mana pihak komponennya tidaklah berhak menuntut sebarang pampasan daripada Kerajaan Negeri* ... (Emphasis added.)

[15] The LOA dated 25 March 1998, which was valid for six months was extended several times. On 13 April 2005, the State Economic Planning Unit agreed to extend the LOA until the Federal Government or the Economic Planning Unit ('EPU') of the Prime Minister's Department approves the proposal for the privatisation of JBANS.

[16] At the same time, the second plaintiff had entered into an agreement with the fifth plaintiff to construct a hotel and the construction of the hotel (Royal Adelphi) was done by the fourth plaintiff. The fifth plaintiff also constructed two official houses for the state government. The plaintiffs took the position that the construction of the hotel and the two government houses were part of the privatisation of JBANS. The construction of the hotel was completed and the hotel commenced operation in early 2002. With regard to the construction of the two government houses, the contract was entered between the fifth plaintiff and Menteri Besar Incorporation ('MBI').

[17] Between 8 September 2004 and 1 July 2005 there were a series of correspondence between the Federal EPU, the state government and between EPU and NSWK, for the parties to finalise the water concession agreement.

[18] However, the concession agreement was not signed.

[19] In a letter dated 15 July 2005, EPU informed NSWK that JBANS was to be corporatised due to a change in government policy, that JBANS was to be corporatised not privatised. This stand was again confirmed by EPU in its letter of 21 October 2005 to NSWK.

[20] The state government held a meeting on the 11 May 2006 with NSWK to inform the latter that the privatisation was cancelled due to a change in the Federal Government policy.

[21] Vide a letter dated 17 May 2006, the State Secretary sent an official

letter to NSWK confirming the meeting of 11 May 2006 and the cancellation of the privatisation of JBANS. In the same letter, the state government proposed a settlement between the defendants and NSWK. The said letter reads:

> ISU PENSWASTAAN JABATAN BEKALAN AIR NEGERI SEMBILAN.
>
> Dengan hormat dan takzimnya sukacita saya merujuk kepada perkara di atas dan mesyuarat berhubung perkara di atas yang telah diadakan pada 11.5.2006.
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> 2. Sebagaimana Y Bhg Dato' sedia maklum, *Kerajaan Persekutuan telah memutuskan bahawa penswastaan Pihak Berkuasa Bekalan Air Negeri-Negeri termasuk Jabatan Bekalan Air Negeri Sembilan (JBANS) tidak lagi dibenarkan, sebaliknya JBANS hanya dikorporatkan.* Ini adalah selaras dengan Struktur Perkhidmatan Air Negara yang diperkenalkan ekoran pindaan Perlembagaan Persekutuan yang meletakkan perkara berkaitan air dalam Senarai Bersama dan juga selaras dengan pengenalan dua Akta berkaitan dengannya iaitu Akta Industri Perkhidmatan Air Negara (IPA) dan Akta Suruhanjaya Perkhidmatan Air Negara (SPAN). Sehubungan dengan itu, usaha penswastaan JBANS yang telah dibuat oleh kerajaan Negeri sejak 1997 yang membabitkan pihak Y Bhg Dato' tidak dapat diteruskan.
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> 3. Hasil mesyuarat yang telah diadakan tempoh hari, Y Bhg Dato' bersetuju bahawa NS Water Konsortium Sdn Bhd tidak akan mengambil tindakan Mahkamah ke atas Kerajaan Negeri ekoran pembatalan usaha penswastaan JBANS. Sebagai balasan pihak atas persetujuan tersebut, Kerajaan Negeri bersedia menimbang untuk kerja-kerja penyelenggaraan dan pengoperasi JBANS yang difikirkan sesuai.
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> 4. Bagaimanapun, cadangan tawaran tersebut seperti di Perenggan 3 adalah tertakluk kepada keputusan Majlis Mesyuarat Kerajaan Negeri (MMK) dan Kerajaan Persekutuan terutamanya selepas SPAN ditubuhkan kelak.
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> 5. Dengan ini, pihak Y Bhg Dato' diminta memberi perakuan bertulis untuk mengesahkan perkara-perkara berikut:
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> (i) tidak akan mengambil sebarang tindakan makamah ke atas Kerajaan Negeri di atas pembatalan penswastaan JBANS; dan
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> (ii) bersetuju menerima cadangan tawaran kepada Kerajaan Negeri seperti di perenggan 3 dengan syarat- syarat yang ditetapkan di perenggan 4.

[22] Therefore, NSWK was informed by the state government that the privatisation agreement cannot proceed for the following reasons:

(a) that the Ninth Schedule of the Federal Constitution had been amended in 2005 to exclude the State's jurisdiction over water supply services; and

(b) that two statutes had been enacted to provide for water supply, the Water Services Industry Act 2006 and the National Water Services Commission Act 2006.

[23] The state government had offered some works to NSWK. However,

after a series of negotiation and counter offers, NSWK declined to accept the offer and commenced this suit against the state government for a breach of the agreement.

DECISION OF THE HIGH COURT

[24] The plaintiffs took the following position, both in the High Court and before this court, that:

(a) there was a concluded contract between NSWK and the state government vide the terms of reference, the LOI and the LOA;

(b) there was part performance of the contract;

(c) the hotel was built at the request of the state government and that both contracts were related and/or connected (construction of hotel and concession agreement); and

(d) due to the cancellation of this privatisation of JBANS, the state government had proposed a settlement of the matter, which the plaintiffs had agreed upon.

[25] On the other hand, it is the submission of the defendants that:

(a) there was no concluded concession agreement;

(b) there was no nexus between the privatisation of JBANS and the construction of the hotel/two official houses;

(c) Prime Minister Department (EPU) had not given their approval for the privatisation of JBANS; and

(d) the contract for privatisation had been frustrated by the constitutional amendment and the change in government policy.

[26] In the High Court, the learned trial judge has made the following orders:

(a) a declaration that the concession agreement had been concluded;

(b) a declaration that the state government's failure to sign the concession agreement was wrong in law and had breached the LOA dated 25 March 1998;

(c) that NSWK be awarded general damages, loss of the value of the concession and loss of profits of the concession, to be assessed;

(d) that the second, fourth and fifth plaintiffs be indemnified for all the losses suffered by them pertaining to the construction of the hotel and the two official houses; and

(e) interests and cost.

OUR DECISION

[27] We are mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. *But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* (Emphasis added.)

[28] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 where the Federal Court held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[29] Bearing in mind the above principles, we will now deal with the issues raised by the appellants/defendants. In this appeal, the appellants/defendants have raised three main issues:

(a) there was no concluded contract, (the concession agreement) between the parties;

(b) if there was an alleged concession agreement, the same was frustrated pursuant to the constitutional amendment on 21 March 2005; and

(c) the second, fourth and fifth respondents were not privy to the alleged concession agreement.

Whether there was a concluded concession agreement between NSWK and the state government

[30] NSWK took the position that the concession agreement had been concluded, and that the execution of the written concession agreement was merely a formality. It is the submission of NSWK that the concession contract was formed based on the terms of reference (1996), the LOI (1997) and the LOA (1998).

[31] Therefore, NSWK's claim against the state government was for damages arising from a breach of contract. It is the pleaded case of the plaintiffs

in paras (26)–(27) of the statement of claim that the state government had breached the terms of the LOA dated 25 March 1998, and the particulars of the breach were:

(a) the defendants have failed to adhere to the terms of the LOA;

(b) the defendants have failed to sign the concession agreement; and

(c) the defendants have awarded the projects under the concession to third parties, namely the construction of the Batu Hampar and Sungai Teriang Dam.

[32] As this case involved the interpretation of the terms of reference, the LOI and the LOA, and whether they formed a binding contract for the privatisation of JBANS, we refer to the case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177; where the Federal Court has, inter alia, laid down the principles of construction of contract as follows:

> [27] ... the restatement of principles in the landmark case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896,16 912–913 '(ICS)' provides a starting point for the consideration of the relevant principles. The judgment of Lord Hoffmann is reproduced below, where His Lordship stated that:
>
> > ... I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384–1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated.
>
> The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
>
> (1) *Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*
>
> (2) The *background was famously referred to by Lord Wilberforce as the 'matrix of fact',* but this phrase is, if anything, an understated description of what the background may include. Subject to the 17 requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.* They are admissible only in an action for rectification. The law makes this distinction for

reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; *the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose* between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.

(5) The 'rule' that *words should be given their 'natural and ordinary meaning' reflects the common sense proposition* that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191*, 201:*

If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business commonsense, it must be made to yield to business common sense. (Emphasis added.)

[33] In the 'Alasan Keputusan', the learned judge has made a finding that an 'open contract' was concluded between the parties and that the parties had partly executed the said contract. The learned judge has made a finding that the terms of the contract had been concluded as per the LOA dated 25 March 1998.

[34] However, we are of the considered opinion that the learned judge has failed to consider the crucial part of the LOA, which read as follows:

2. *Surat tawaran konsesi* ini adalah *berkuatkuasa selama enam bulan* daripada tarikh ianya dikeluarkan. *Sekiranya perjanjian konsesi gagal dimuktamadkan antara Kerajaan Negeri dengan Syarikat Konsesi, maka surat tawaran konsesi ini akan terbatal dengan sendirinya*. (Emphasis added.)

[35] The conditional LOA clearly stipulates that the concession offer was valid for six months, and that if the concession agreement was not finalised ('dimuktamadkan') between the state government and the concession company, then the LOA will be cancelled automatically. We are therefore of the considered opinion that from a plain and natural reading of the above para (2)

of the LOA, we find that the parties have plainly intended the execution of a separate written concession agreement as a pre-requisite to the conclusion of a binding contract.

[36] The LOA was a 'subject to contract' to enter into a future contract, the concession agreement ('CA'). Unless and until the CA materialised, the LOA was not enforceable, whether on its own or read with the terms of reference and the LOI. This court in *Kheamhuat Holdings Sdn Bhd v The Indian Association, Penang* [2006] 4 MLJ 656; [2006] 2 CLJ 1040 held as follows in relation to the effect of a subject to contract:

> (1) Where an arrangement is made 'subject to contract' or 'subject to the preparation and approval of a formal contract', it would be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. The MOU in the present case made it very clear that the MOU was subjected to a final and formal agreement between the parties. Following the principle stated in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprise Sdn Bhd* , the MOU was nothing more than a basis for negotiations and the parties did not intend to be bound by the MOU until a formal agreement was executed. There was no legally binding contract between the parties until the execution of a formal agreement.

[37] We are of the considered opinion that the LOA contained certain condition precedents to be fulfilled and envisaged the execution of a formal CA on the privatisation of JBANS. The LOA is clearly 'subject to contract' or 'subject to the preparation and approval of a formal contract'. From the documentary evidence, the state government was waiting for the approval of the plan to privatise JBANS from the EPU, Prime Minister Department. As such, in its plain and natural meaning, the LOA must be construed to mean that the parties are still negotiating and do not intend to be bound until a formal contract is exchanged. The LOA in the present appeal made it very clear that the LOA was subjected to a final and formal CA between the parties.

[38] Added to that, para 2(iv) of the LOI clearly states that the 'Perjanjian ini hendaklah ditandatangani dalam bulan April 1997'. Therefore, from the LOI to the LOA, parties have clearly intended that the contract for the privatisation of JBANS would only be binding upon the CA being signed by both parties.

[39] Even if we are to accept NSWK's argument that the LOI and the LOA already formed a binding contract, why is there a term in the LOA that provides for the LOA to be cancelled automatically if the CA was not signed within six months. This is because the parties would only be bound by the CA when the same is finalised and signed. This was also NSWK's position as can be seen from exh P69, NSWK's letter dated 1 July 2005 to EPU, Prime Minister Department:

> Sukacita kami maklumkan bahawa melalui surat bertarikh 6 June 2005, pihak Unit Perancangan Ekonomi Negeri, Negeri Sembilan telah memaklumkam bahawa *penswastaan Jabatan Bekalan Air* Negeri Sembilan masih lagi dalam tindakan Unit Perancang Ekonomi, Jabatan Perdana Menteri ...
>
> ...
>
> *Walaupun kami berasa hampa dengan kelewatan dan penundaan yang telah dialami dalam menandatangani perjanjian konsesi yang bakal merasmikan perhubungan baik antara Kerajaan Negeri Sembilan dan N.S. Water Konsortium Sdn Bhd* kami menerima dengan baik surat daripada Kerajaan Negeri Sembilan yang mengesahkan bahawa projek penswastaan Jabatan Bekalan Air Negeri Sembilan masih dalam tindakan Unit Perancang Ekonomi, Jabatan Perdana Menteri yang sekali gus memberi keyakinan kepada kami *bahawa pihak tuan akan mengambil tindakan sewajarnya untuk memastikan supaya perjanjian konsesi tersebut akan ditandatangani dalam masa terdekat*. (Emphasis added.)

[40] Further, from the conduct of the parties to continually extending cl 2 of the LOA over a few years, clearly indicated that they had accepted the requirement to sign the formal CA. If a concession contract was already concluded from the LOI and the LOA, there is no requirement for the parties to extend the validity of the LOA from 1998–2005. It is very clear that the purpose of the several extensions of the LOA was to avoid the LOA from being automatically cancelled, and to enable the parties to sign the CA.

[41] In any event, the conditional LOA was extended several times, to allow the EPU, Prime Minister Department to consider and approve the privatisation project of JBANS and for parties to conclude and sign the CA. The extensions were made vide letters dated 5October 1998, 7 June 2000, 14 June 2002, 11 July 2003, 5 March 2004 and 13 April 2005. In the letter dated 5 March 2004, the State EPU informed NSWK that the state government had agreed to extend the conditional LOA for '... kepada satu (1) tahun lagi *atau sehingga tarikh Perjanjian Penswastaan dimuktamadkan* mengikut masa yang terdahulu'. In a letter dated 13 April 2005 extending the six month period, the State EPU informed NSWK, inter alia that:

> 2. Kerajaan Negeri bersetuju melanjutkan tempoh surat Tawaran Konsesi Jabatan Bekalan Air Negeri Sembilan yang tamat pada 31 Mac 2005 *sehingga pihak Kerajaan Persekutuan/Unit Perancang Ekonomi (EPU), Jabatan Perdana Menteri membuat keputusan berhubung dengan cadangan Penswastaan Jabatan Bekalan Air Negeri Sembilan.* Walau bagaimanapun tempoh tersebut adalah tertakluk kepada semakan berkala oleh Kerajaan Negeri. (Emphasis added.)

[42] In *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] MLJ 165; [1963] 1 LNS 77, the following passage can be found at p 172:

> That the execution of a subsequent document in the nature of a formal contract, possibly containing such terms as were not included in the option, was within the

A contemplation of the parties is clearly demonstrated by the fact that upon the exercise of the option the solicitors of the parties proceeded to draw up a formal contract was drawn up and signed by the Plaintiff although it was not signed by the Defendants. *There is overwhelming authority for the proposition that this subsequent agreement could not be said to have been agreed upon until it was executed by the Defendant by subscribing their signatures to it*. (Emphasis added.)

B

[43] In the present case, we are of the considered opinion that the parties have not concluded, nor signed the CA when EPU issued the letter dated 15 July 2005 to NSWK, where EPU informed NSWK that JBANS was to be C corporatised, not privatised, due to a change in government policy. This position was confirmed in the meeting on 11 May 2006 and subsequently vide a letter dated 17 May 2006, the State Secretary sent an official letter to NSWK confirming the cancellation of the privatisation of JBANS. In the circumstances, we find that no CA had been reached between the state D government and NSWK. From the LOA, it is clear that the intention of the parties was to execute a formal CA.

[44] In *Kam Mah Theatre Sdn Bhd v Tan Lay Soon* [1994] 1 MLJ 108; [1994] 1 CLJ 1 the Supreme Court held that there was no contract at all E because the relevant document was dependent on the signing of a formal contract to be further negotiated and approved by both parties. The Supreme Court held that:

(a) there was no contract at all, because the said document was dependent F on the signing of a formal contract to be further negotiated and approved by both parties. The proviso in the said document was very similar to the phrase or formula of 'subject to contract'. There need not be the very words of the said formula in order to have the usual effect arising from the use of such formula;

G (b) it is settled that the formula of 'subject to contract' gives rise to a strong presumption of the necessity of a further formal contract and it requires cogent evidence to displace this strong presumption; and

(c) the evidence of surrounding circumstances, background and H negotiations between parties is relevant to show that there was no contract or no concluded and binding agreement at all.

[45] In the present case, the LOA itself mandates that if a concession agreement was not signed within six months, or within the extended period, I the LOA would be cancelled automatically. It is not in dispute that the concession agreement was not finalised, nor was it concluded and executed in this case. The surrounding circumstances of this case, namely:

(a) the LOI envisaged that a concession agreement would be signed in April 1997;

(b) the LOA which provides that the LOA would be cancelled automatically if the concession agreement was not signed within six months;

(c) that para (c) of the LOA stipulates that the concession agreement must contain the terms (i) to (vi), inter alia, that the state government must own 20% equity of the concession company;

(d) the fact that the privatisation of JBANS was still with the EPU,

(e) Jabatan Perdana Menteri pending approval; and

(f) the numerous correspondence to the EPU on the privatisation issue,

clearly shows that parties were waiting to sign the CA. Therefore, the requirement of signing a CA in the LOA gives rise to a strong presumption of the necessity of a formal contract, and cogent evidence must be given to displace this strong presumption. In the present case, even NSWK had agreed that the parties should sign the concession agreement as can be seen from their letter dated 13 May 2005 (exh P67), which reads, inter alia:

> Kami dengan hormatnya merujuk kepada perkara diatas dan surat tuan bertarikh 13 Apil 2005.
>
> Menurut surat tersebut, kami dimaklumkan bahawa *Kerajaan Negeri telah sekali lagi melanjutkan tempoh surat Tawaran Konsesi Jabatan Bekalan Air Negeri Sembilan yang tamat pada 31 Mac 2005 keada suatu tarikh yang belum ditetapkan.*
>
> ...
>
> Kini, lebih kurang tujuh (7) tahun telah berlalu dan walaupun segala rundingan perjanjian tersebut telahpun selesai, *perjanjian tersebut masih belum ditandatangani.*
>
> *Ingin kamu maklumkan bahawa segala kegagalan untuk memuktamadkan perjanjian konsesi antara Kerajaan Negeri dan Syarikat Konsesi* bukanlah disebabkan oleh keengganan Syarikat Konsesi untuk berbuat demikian kerana Syarikat Konsesi bersedia untuk menandatangani perjanjian konsesi dan berupaya untuk melaksanakan tanggungjawab yang telah diperuntukkan.
>
> Oleh itu, besarlah harapan kami sekiranya pihak Kerajaan Negeri dapat mengaturkan mesyuarat dalam masa terdekat bagi tujuan tersebut diatas. (Emphasis added.)

[46] In *Ayer Hitam Tin Dredging Malaysia Berhad v YC Chin Enterprises* [1994] 2 MLJ 754; [1994] 3 CLJ 133, the Supreme Court had recognised that the nature and size of an agreement is a relevant factor in determining whether parties would agree to be bound informally, or by a formal agreement. Justice Edgar Joseph Jr SCJ held that:

A In the first place, we should like to make the observation that one would expect that a contract of this nature and magnitude involving as it does a very substantial financial commitment, to wit, RM14 million, would be properly documented.

B **[47]** We are of the considered opinion that in this case, where the CA was with regard to management of water supply for the state of Negeri Sembilan, it involved public interest, public policy and public funds. In view of the nature of the concession agreement, it is common sense that both parties would intend to be contractually bound upon the execution of the CA. It would be irrational C if an agreement involving public interest, public policy and public fund of hundreds of millions of ringgit be reduced to merely a few pieces of paper in the description of the LOI and the LOA.

D **[48]** Hence the relevance of ss 3 and 9 of the Government Contracts Act 1949, which provides that a contract, such as a CA, be reduced in writing in the name of the state government and signed by the Chief Minister, or an official duly authorised. Indeed, the complexities of a concession contract would mandate that the CA must be a formal, written contract.

E **[49]** In the premise, we find that the documents or letters relied on by NSWK as constituting a binding contract, namely the terms of reference, the LOI and the LOA, clearly contemplated the execution of a further contract between the parties, the CA itself. In such circumstances, there is no enforceable contract because the condition is unfulfilled or because the law F does not recognise a contract to enter into a contract. In *Ayer Hitam Tin Dredging Malaysia Berhad*, in delivering the judgment of the court Edgar Joseph Junior SCJ cited with approval the following passage in *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284:

G *It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of bargain* or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the *former case there is no enforceable contract either because the condition* H *is unfulfilled or because the law does not recognise a contract to enter into a contract*. (Emphasis added.)

I **[50]** NSWK took the position that the CA had been concluded, and that the execution of the agreement was merely a formality. NSWK relied on the case of *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327; [1997] 1 CLJ 625 where the Federal Court held that the phrase 'subject to the sale and purchase agreement' relied on by the vendor did not point to an intention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed. Rather, it was, they continued,

that when read in the context of the correspondence and the objective aim of the transaction, indicative of an intention to merely formalise the agreement already concluded between the parties.

[51] However, in *Charles Grenier Sdn Bhd*, the court was only concerned with two letters pertaining to a sale and purchase of a property. The court had examined the contents of the two letters: (1) where the vendor accepted the purchaser's offer of RM450,000 on condition that the purchaser pay the ten per cent deposit by 28 November 1989 and the balance within three months from the execution of the sale and purchase agreement; and (2) the letter enclosing the ten per cent cheque and confirming the purchaser's offer to purchase the property 'subject to the sale and purchase agreement'. The court held that there was nothing to show that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed. The court added:

> They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed as an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law will — acting out of necessity (see *Liverpool City Council v Irwin* [1977] AC 239) — imply terms into the contract for sale in order to make it work.
>
> *See Rojasara Ramjibhai Dahyabhai v Jani Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that there was to be implied in a contract for the sale of land, a covenant on the part of the vendor to do all things necessary to give effect to the agreement.
>
> Dr Geoffrey Cheshire in the 10th edition of his work, The Modern Law of Real Property, describes an open contract as follows:
>
> > If a contract for sale specifies merely the names of the parties, a description of the property and a statement of the price, it is called an open contract. When this form of contract is made, the parties are bound by certain obligations implied by the law.
>
> The phrase 'subject to the sale and purchase agreement' relied on by counsel for the appellant does not, in our judgment, point to an attention that no contract was to come into existence until a formal sale and purchase agreement had been prepared and executed.
>
> Rather, it is, when read in the context of the correspondence and the objective aim of the transaction — and this is how we read them — indicative of an intention to merely formalise the agreement already concluded between the parties.

[52] In our present appeal, we are not dealing with a simple contract for the sale and purchase of a property. We are dealing with the privatisation of JBANS and the management of water resources for the public in the state, and this

would definitely involve not only public policy and public funds but also public interest. For a project of such magnitude, it is inconceivable that the parties would be bound only by the LOI and the LOA.

[53] In fact, the Federal Court in *Charles Grenier Sdn Bhd*, held that in order to ascertain the intention of the parties, the court will have to read the correspondence in its proper context and to look at the objective aim of the transaction. In the present appeal, the objective aim of the transaction was the privatisation of JBANS for the management of water resources in the state. It is not a simple transaction. The privatisation process that started in 1996 was not even concluded until the constitutional amendment in 2005, which led to a change in government policies from privatisation to corporatisation.

[54] Added to that, the contemporaneous documentary evidence clearly showed that the parties had intended to conclude the concession by signing the CA. The LOI envisaged that a concession agreement would be signed in April 1997, whilst the LOA provides that the LOA would be cancelled automatically if the CA was not signed within six months. There were numerous correspondence to the State and Federal EPU to impress on the signing of the concession agreement. The State was waiting for the approval from EPU, Prime Minister's Department on the privatisation of JBANS. In fact, in their letter dated 31 May 2006, NSWK had conceded that the privatisation had not commenced since the issuance of the LOA.

[55] Therefore, the above documents clearly established the fact that the parties have not signed the CA, and the letters of extension of the LOA clearly showed that the privatisation project of JBANS was still subject to the approval of the EPU, Prime Minister Department. There is no binding CA for the plaintiff to sue the state government for damages due to a breach of the CA. The learned trial judge fell into error when she made a finding that there was binding concession agreement between the parties that allows the plaintiff to claim for value and the profit from the alleged CA.

[56] We also find that the learned judge fell into error in her finding that an open contract was concluded between the parties based on the conduct of parties, the documents and part performance. Again, this is a bare finding bereft of any conclusive finding of facts. Added to that, based on the reasons enumerated above, we are of the considered opinion that such finding is not supported by the evidence.

[57] With regard to part performance, the Muar Dam was a duly completed project under a different contractual agreement where full payment had been

made. Therefore, it cannot be said to be part of the LOA.

Whether the concession agreement (if any) was frustrated pursuant to the constitutional amendment in 2005

[58] In view of our finding that there is no concluded contract, we find no necessity to look into the issue of frustration.

[59] However, for the sake of completeness and as the parties have submitted on this issue extensively, we will also deal on the issue, on the basis if there was, a concluded contract.

[60] The first objection raised by the plaintiffs was that the issue of frustration was not pleaded in the SOD. The learned judge had agreed with the plaintiffs that the issue of frustration was not pleaded nor particularised in the statement of defence.

[61] However, we take the view that the facts on frustration were pleaded in para 19 of the SOD. The defendants have pleaded that the plaintiffs have been informed that because of the constitutional amendment, the Federal Government had decided that JBANS must be incorporated, and the privatisation must cease to take place. The defendants further pleaded that NSWK had accepted the decision of the Federal Government and that the state government will offer some projects, *ex gracia* to NSWK, subject to the approval of the State and the Federal Government.

[62] The next issue here is whether the alleged concession agreement in the form of the LOI and the LOA, was frustrated due to the constitutional amendment pursuant to s 57 of the Contracts Act 1950, which reads:

> 7 Agreement to do impossible act
>
> (1) An agreement to do an act impossible in itself is void
>
> *Contract to do act afterwards becoming impossible or unlawful*
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> *Compensation for loss through non-performance of act known to be impossible or unlawful*
>
> (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee

for any loss which the promisee sustains through the non-performance of the promise.

[63] Subsection 57(2) provides that a contract to do an act, which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Therefore, a contract is frustrated, when after the contract has been made, the act becomes either impossible or unlawful. In the case of *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen Chih & Anor* [2009] 6 MLJ 293 at p 303 at para 22, the Federal Court states as follows:

> A contract does not become frustrated merely because it becomes difficult to perform. If a party has no money to pay his debt, it cannot be considered impossible to perform as it is not frustration. Neither can he plead frustration because the terms of the contract make it difficult to interpret. If it cannot be performed or becomes unlawful to perform, then the party who is to perform his part of the bargain can plead frustration. The doctrine of frustration is only a special case to discharge a contract by an impossibility of performance after the contract was entered into (see *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 (HL)). A contract is frustrated when subsequent to its formation, a change of circumstances renders the contract legally or physically impossible to be performed (see Visu Sinnadurai, Law of Contract in Malaysia and Singapore: Cases and Commentary (second Ed), 1987) at p 519).

[64] In the Court of Appeal case of *Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd* [2007] 4 MLJ 201; [2007] 3 CLJ 695, the court explained that three elements must be present to show that a contract has been frustrated. They are as follows:

(a) the event upon which the promisor relies must have been one for which no provision has been made in the contract;

(b) the event relied upon by the promisor must be one for which he or she is not responsible; and

(c) the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by contract.

[65] In the present case, there is clearly no provision on the constitutional amendment in either the terms of reference, LOI or the LOA. The constitutional amendment was made by the Federal Government, not the state government. The constitutional amendment on 21 March 2005 amended the Ninth Schedule of the Federal Constitution, whereby 'water supply and services' fell within the Federal List and the Concurrent List. The State List was

also amended whereby item 6 (c) excluded 'water supplies and services' from the State jurisdiction. Therefore, water supply and services fell under the exclusive jurisdiction of the Federal Government. Pursuant to the constitutional amendment, the Water Services Industry Act 2006 and National Water Services Commission Act 2006 were enacted.

[66] The state government took the position that the constitutional amendment took away the jurisdiction and the powers of the state to deal with water supply and services. Therefore, the state government submitted that with the constitutional amendment, the State no longer has the jurisdiction to deal with water supplies and services. Since the constitutional amendment was made on 21 March 2005, and that the plaintiffs' pleaded case of a breach of the agreement was on 11 May 2006, it is the submission of the state government that apart from the fact that the concession agreement had not been signed by the parties, the alleged contract, if any, was frustrated by the event of the constitutional amendment.

[67] The amendment to the Federal Constitution shifted the water supply and water services to the Federal List from the State List, in that legislations in respect of the water supply and water services are now within the competency of the federal parliament. The amendment will not have any effect unless federal laws are enacted, and this was done with the passing of the Water Services Industry Act 2006, which took effect on 1 January 2008. Section 3 of the Water Services Industry Act 2006 provides that the Federal Government shall have executive authority over all matters relating to water supply systems and water supply services throughout Peninsular Malaysia. Therefore, when this Act takes effect on 1 January 2008, we are of the considered opinion that any alleged concession agreement between NSWK and the state government became frustrated. Once the contract was discharged by frustration, the contract comes to an end and the parties are discharged from their performances.

[68] Once the concession contract (if any) was held to have been frustrated, the consequential remedies are statutorily provided. Pursuant to s 15 of the Civil Law Act 1956, the plaintiffs are limited to claiming for expenses so incurred and the benefit for work done, and such amount must be reasonable in its estimation.

[69] In the present appeal, we find that the learned judge has failed to consider the issue of frustration as a result of the constitutional amendment. Added to that, the learned judge had made a fundamental error in awarding the value of the concession and future profits for the entire concession period of thirty years. Had the learned judge made a finding that the concession agreement (if any) was frustrated due to the constitutional amendment, the

A amount of damages, if any, should be limited to what is provided for by s 15 of the Civil Law Act 1956.

Whether the second, fourth and fifth plaintiffs were privy to the CA (if any)

B **[70]** It is the pleaded case of the plaintiffs that based on the representation made by the (then) Menteri Besar of the state government that NSWK would be given the concession agreement, the fourth and the fifth plaintiffs agreed to construct a hotel (previously the Royal Adelphi Hotel) and two official houses. The agreement to construct the two houses was executed with MBI.

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[71] However, the Menteri Besar was not made a party in this suit. Added to that, the plaintiffs took the position that the concession agreement was concluded with the LOI dated 1997 and the LOA dated 1998, but the representations were allegedly made from 2002–2004. Therefore, if the D concession agreement had already been concluded vide the LOA in 1998, there is clearly no nexus between the concession agreement and the construction of the hotel and the two official houses.

E **[72]** Therefore, we find that the learned trial judge made a fundamental error when he decided that the second, fourth and fifth plaintiffs were entitled to be indemnified with damages because the construction of the hotel and the two government houses were connected and/or related to the concession agreement. The learned judge held as follows:

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> 13. Mahkamah putuskan Defendan-Defendan telah memungkiri untuk menanggung rugi Plaintif 2, Plaintif 3, keempat dan kelima apabila gagal untuk membayar kos-kos pembinaan, hutang-hutang dan tanggungan lain berkaitan pembinaan hotel dan 2 buah rumah VIP. Adalah tidak adil untuk pihak Defendan-defendan menikmati faedah hotel dan 2 rumah VIP tetapi membiarkan G Plaintif 2 hingga 5 menanggung hutang dan liability.

[73] We are also of the considered opinion that in view of our findings that there was no concession agreement between the state government and NSWK, H then the second to the fifth plaintiffs' claim for indemnity must also fall.

[74] In any event, despite the learned judge's finding that there was a nexus between the concession agreement and the construction of the hotel, there is nothing in the terms of reference, LOI or the LOA that makes reference to the I hotel or the two houses that allows the second to the fifth plaintiffs to sue for indemnity. The second to the fifth plaintiffs were not privy to the LOI or the LOA and were therefore not entitled to be indemnified for the alleged breach of the CA and/or the frustration of the alleged concession agreement.

[75] With regard to the construction of the two official houses, the construction contract was entered between the fifth plaintiff and MBI. The rights of the parties were specified in that contract, and if the fifth plaintiff has any complaint over the same, they can sue MBI for any alleged nonpayment for the construction of the said houses.

CONCLUSION

[76] Premised on the reasons enumerated above, we find merit in the defendants' appeal and we set aside the decision of the learned judge dated 21 July 2017 with costs of RM250,000 here and below subject to payment of allocation fees.

Appeal allowed, decision of the High Court set aside.

Reported by Ashok Kumar